To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ROBERT TILFORD,

Plaintiff,

-against-

GREENBURGH HOUSING AUTHORITY and UNITY MECHANICAL CORP.,

Defendants.

----------X

INDEX NO. 62522/2016

DECISION/ORDER

Motion date: 7/26/17
Motion Seq. 1

ECKER, J.

The following papers numbered 1 through 13 were read on the motion of UNITY MECHANICAL CORP. ("Unity"), made pursuant to CPLR 3211(a)(7), seeking an order dismissing the complaint, as against ROBERT TILFORD ("plaintiff"):

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exs. A-F	1 - 8
Tilford Affirmation in Opposition, Exs. A-B [1]	9 - 11
Greenburgh Housing Authority Affirmation in Opposition [2], Ex. A	11 - 12
Affirmation in Reply	13

Upon the foregoing papers, the court determines:

According to the complaint, on October 26, 2015, plaintiff was injured when he fell into an open trapdoor hatch in the floor of the lobby of an apartment building located at 2 Beech Street, White Plains, NY (the "premises"). Plaintiff was and is a resident of the premises which is located in and owned by defendant Greenburgh Housing

[1] Court rules require plaintiff to use numbered exhibit tabs.

[2] The Greenburgh Affirmation in Opposition is improperly labeled as "Affirmation in Support".

Authority ("GHA"). Unity was invited by GHA to attend a Pre-Bid Conference at the premises to place a bid on a program to replace drains and water systems at the premises.

At the Pre-Bid Conference, George Lux ("Lux"), the Maintenance Director of GHA, brought Ryan McCormick ("McCormick"), Unity's employee, and other contractors to the premises to inspect sewer lines in preparation for bidding on the project. Lux opened a door which provided access to a crawl space to allow inspection of sewer lines beneath the lobby floor. McCormick entered the crawl space and then left the crawl space. Lux was nearby when McCormick exited; however, it is unclear from the submissions how close he actually was to the crawl space, or whether he was in the lobby or outside the building when McCormick exited the crawl space. The door to the crawl space was left open and later that day plaintiff fell into the crawl space resulting in injuries.

On November 20, 2015, plaintiff served a Notice of Claim on GHA. On January 13, 2016, a GML § 50-h hearing concerning his claim was held. Plaintiff served the summons and complaint on both defendants on September 7, 2016. GHA filed its answer on October 28, 2016. Unity's attorney filed its notice of appearance on June 1, 2017 and filed this pre-answer motion to dismiss pursuant to CPLR 3211(a)(7) on the same day.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Davis v South Nassau Community Hosp.*, 26 NY3d 563, 572 [2015]; *Anzora v Saxon Ave. Corp.*, 146 AD3d 848 [2d Dept 2017]. That is, such a motion to dismiss should be granted only where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016]. "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" *Tri-Star Lighting Corp. v Goldstein*, 151 AD3d 1101 [2d Dept 2017], *quoting EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].

"Liability for a dangerous condition on property is generally predicated on ownership, occupancy, control or special use of the property. The existence of one of these elements is sufficient to give rise to a duty of care. However, liability can also be imposed upon a party that creates a defective condition." *Micek v Greek Orthodox Church of Our Savior,* 139 AD3d 830 [2d Dept 2016]. Because a finding of negligence must be based on a breach of duty, a threshold question in tort cases is whether the

tortfeasor owed a duty of care to the injured party. *Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002].

The question before the court is whether McCormick's act of leaving the door open gave rise to a duty of care owed by Unity to plaintiff. In *Espinal*, supra, the Court of Appeals stated "the existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations." There, the Court relied on Judge Cardozo's opinion in *Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928], wherein Judge Cardozo warned against imposing liability under circumstances which could render parties liable to an indefinite number of potential beneficiaries.

The Court in *Espinal,* supra went on to discuss cases which identified contractual situations involving possible tort liability of a contractor to third persons, before concluding that potential liability in tort to third persons arises when (1) a contractor, in failing to exercise reasonable care, launches a force or instrument of harm; (2) where plaintiff detrimentally relies on continued performance of the contracting party's duties; or (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. *Somekh v Valey Natl. Bank*, 151 AD3d 783 [2d Dept 2017].

The issue in *Espinal,* supra, was whether a snow removal contractor owed a duty of care to a person who slipped and fell on an icy parking lot which the contractor allegedly failed to properly clear of snow. The alleged duty the contractor owed to plaintiff was predicated on the first situation, namely that the contractor failed to exercise reasonable care, thereby launching a force or instrument of harm. The Court determined that the snow removal contractor had no duty of care to plaintiff where plaintiff's fall on ice "was not the result of the contractors having 'launched a force or instrument of harm.' By merely plowing snow the (the defendant contractor) cannot be said to have created or exacerbated a dangerous condition."

While the case here is not based on contractual relationship, the court recognizes the strong public policy against imposing liability under circumstances which could render parties liable to an indefinite number of potential beneficiaries. Applying the principles elaborated in *Espinal,* and viewing the allegations by plaintiff and GHA as true, the court finds that Unity has established prima facie that it did not own, occupy, control, or put to a special use the premises at the time of the accident. Further Unity also established that it did not create the alleged dangerous condition through any efforts it undertook. *Micek, supra.*

Similar to the arguments raised in *Espinal,* plaintiff's and GHA's oppositions rely on the allegation that McCormick, by leaving the door open after leaving the crawl space, created or exacerbated a dangerous condition. It is undisputed that Lux opened the door and invited McCormick to inspect the crawl space. Plaintiff's fall was not the result of Unity or McCormick launching a force or instrument of harm. By not closing the door it cannot be said that Unity created or exacerbated a dangerous condition.

Espinal, supra. Hence, the court finds that Unity owed no duty of care to plaintiff, and Unity is entitled to the relief demanded, namely dismissal of the complaint as against it. Accordingly, it is hereby

ORDERED that the motion of defendant UNITY MECHANICAL CORP, made pursuant to CPLR 3211(a)(7), as against plaintiff ROBERT TILFORD, is granted and the complaint is dismissed as against UNITY MECHANICAL CORP.; and it is further

ORDERED that the remaining parties in this action are to appear at the Preliminary Conference Part of the Court, Room 811, on September 25, 2017, at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
August 31, 2017

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Raneri, Light, Sarro & O'Dell, PLLC
Attorneys for Plaintiff
Via NYSCEF

Sokoloff Stern LLP
Attorneys for Defendant Greenburgh Housing Authority
Via NYSCEF

Molod Spitz & Desantis, P.C.
Attorneys for Defendant Unity Mechanical Corp.
Via NYSCEF